51

(2)

No. 09-18

Supreme Court, U.S.
FILED
AUG 19 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GANG B. SONG,

Petitioner,

v.

PAMELA TURNER, CHARLOTTE BUSH and CITY OF DETROIT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW JARVIS
Counsel of Record
GRANT HA
660 Woodward, Ste. 1650
Detroit, MI 48226
(313) 237-3069

Attorney for Respondent City of Detroit

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Has Petitioner presented compelling reasons to grant the Petition, where the granting and affirming of Respondents' motion for Summary Judgment was appropriate?

RULE 29.6 DISCLOSURE STATEMENT

Respondent City of Detroit is a Michigan municipal corporation, which has no parent company and no corporate stock

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
RULE 29.6 DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW	2
REASONS FOR DENYING THE PETITION	4
I. PETITIONER'S "MISSTATEMENT" HAD NO EFFECT ON THE GRANTING AND AFFIRMATION OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT	4
II. THERE WAS NO VIOLATION OF RULE 10 OF THE CITY OF DETROIT'S CIVIL SERVICE CODE	5
III. THE DISTRICT COURT REFUSED TO CONSIDER PETITIONER'S *PRO SE* SUBMISSION AND FOUND THAT, IF THEY DID, THERE WOULD BE NO CHANGE IN THE ANALYSIS	6
IV. PETITIONER'S OBSTRUCTION CLAIM WAS NOT PRESERVED FOR APPEAL	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

McDonnell-Douglas v. Green, 411 U.S. 792 (1973) 2

Morris v. Oldham Cty. Fiscal Court, 201 F.3d 784 (6th Cir. 2000) 3

Taft Broadcasting Co. v. United States, 929 F.2d 240 (6th Cir. 1991) 7

White v. Anchor Motor Freight, Inc., 899 F.2d 555 (6th Cir. 1990) 7

OTHER AUTHORITIES

Civil Service Rule 10 from the City of Detroit Charter of 1997 5

INTRODUCTION

Petitioner is an employee of the Respondent's Water and Sewerage Department. Petitioner currently holds the title of Senior Associate Civil Engineer – Design. This is the same title that he was promoted to in 1995 and last held in 1995.

In early 2006 the Detroit City Council refused to approve rate increases for the 2006-2007 fiscal year, which began in July 2006. The City Council did eventually approve the rate increase, but due to the delay and the notice requirement for increase in rates to the public, the Respondent's Water and Sewerage Department suffered a budget shortfall, which resulted in the demotion or layoff of over 130 employees. Mr. Song was one of the many employees who were demoted to a previously held title.

As a non-union employee, Mr. Song was able to challenge his reversion from his position as a Water Systems Maintenance Engineer to his previously held title, Senior Associate Civil Engineer – Design through the City of Detroit Civil Service Rules and the Grievance procedure. Mr. Song's grievance was processed and he was given the opportunity to present his grievance in front of a neutral third party hearing officer selected by Mr. Song and the City of Detroit. At the hearing Mr. Song was given the opportunity to present his case and any evidence, which he believed supported his claim including his allegation of race discrimination and retaliation. After the hearing Mr. Song's Grievance was denied by

the hearing officer. Later the full Civil Service Commission adopted the Hearing Officer's Report and Findings of Fact.

COUNTER-STATEMENT OF THE CASE

BACKGROUND AND SUMMARY OF THE DECISIONS BELOW

Petitioner Gang Song was demoted on April 21, 2006 during a reduction in force in the Water and Sewerage Department of the City of Detroit.

On May 25, 2006 Petitioner filed an EEOC charge alleging race discrimination and retaliation.

On April 26, 2006 Petitioner filed a grievance through the City of Detroit's Civil Service Rules. Petitioner's grievance was denied by the hearing officer and approved by the Commission on March 23, 2007.

Petitioner filed a lawsuit in U.S. District Court on September 15, 2006. The District Court granted Respondent's motion for Summary Judgment on March 31, 2008.

Petitioner's discrimination claim was analyzed under the *McDonnell-Douglas* test.[1] There was no dispute that Petitioner met the first three prongs of the test. He was a member of a protected class, he

[1] *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973).

suffered an adverse employment action, and he was qualified for the position. The fourth prong requires that he be treated differently from similarly situated persons outside the protected class. The Court found that there were no allegations or other evidence in the record that showed any non-Asian persons treated differently than Petitioner.

> For a retaliation claim a Plaintiff must prove that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment . . . If and when a plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reasons for its actions . . . then Plaintiff must demonstrate that the proffered reason was not the true reason for the employment.[2]

The Court determined that for the purposes of surviving summary judgment that the first three prongs were satisfied. The Court then found that there was no evidence that Petitioner's demotion was

---

[2] *Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784, 792-93 (6th Cir. 2000).

tied to his protected activity. There was no evidence that the demotion was the result of anything but the reduction in force.

The District Court also looked at Petitioner's *pro se* submissions and determined that even if the Court considered them, they would have no effect on the Court's analysis.

Petitioner appealed the District Court's decision on April 15, 2008. The Court of Appeals affirmed the District Court's order granting summary judgment on December 1, 2008. Petitioner filed a petition for rehearing, which was denied on February 24, 2009.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S "MISSTATEMENT" HAD NO EFFECT ON THE GRANTING AND AFFIRMATION OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

The District Court properly analyzed Petitioner's claim on the basis of both discrimination and retaliation. Petitioner's discrimination claim was dismissed because, the Court found that there were no allegations or other evidence in the record that showed any similarly situated persons outside the protected class. Petitioner's retaliation claim was dismissed because there was no evidence that the demotion was the result of anything but the reduction in force.

II. THERE WAS NO VIOLATION OF RULE 10 OF THE CITY OF DETROIT'S CIVIL SERVICE CODE.

Civil Service Rule 10 applies to reduction in force.[3] Petitioner contends that his demotion violates Civil Service Rule 10 Section 2(b) 2(b). This issue was not raised or properly preserved on appeal.

Even if petitioner had properly preserved this issue, Petitioner misreads Rule 10. Section 2(b) 2(b) applies to demotion or transfer to a formerly held class.

Section 2(b) 2(b) states: "If the employee has previously held permanent status in another class not in series which is at the same or lower level, the employee may elect demotion or transfer to such class, provided there are one or more employees in the class in the department having less total city seniority."

Section 2(b) 2(b) applies when an employee previously held permanent status in another class not in series at a same or lower level. Section 2(b) 2(b) is violated when an employee who has previously held permanent status in a different class not in his current series is not allowed to accept a demotion or transfer to that class, provided the remaining requirements are also met. Petitioner accepted demotion to his previously held class, which was Senior

---

[3] *See* Civil Service Rule 10.

Associate Civil Engineer – Design. Senior Associate Civil Engineer – Design is a formerly held class not in series.

Because there was no violation under Section 2(b) 2(b), this is not a compelling reason to grant Petitioner's Writ of Certiorari.

III. THE DISTRICT COURT REFUSED TO CONSIDER PETITIONER'S *PRO SE* SUBMISSION AND FOUND THAT, IF THEY DID, THERE WOULD BE NO CHANGE IN THE ANALYSIS.

Petitioner contends that the District Court should have considered his *pro se* submissions. The District court reviewed the *pro se* submissions and noted that even if they considered them, they would have no effect on the Court's analysis. Further, the Court ordered Petitioner to refrain from filing any additional materials on a *pro se* basis so long as counsel represented him.[4]

IV. PETITIONER'S OBSTRUCTION CLAIM WAS NOT PRESERVED FOR APPEAL.

Petitioner did not properly preserve this issue for appeal. Unless exceptional circumstances are present, this Court normally will not address an issue not

---

[4] *See* District Court Decision In Petitioner's Petition for Writ of Certiorari, App. 30-31.

raised in the District Court.[5] No exceptional circumstances are present in this case. Hence, this issue should not be reviewed for the first time on appeal.

CONCLUSION

Petitioner has not demonstrated any compelling reason for this Court to grant the Petition for Writ of Certiorari. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ANDREW JARVIS
Counsel of Record
GRANT HA
660 Woodward, Ste. 1650
Detroit, MI 48226
(313) 237-3069

Attorney for Respondent
City of Detroit

[5] *See Taft Broadcasting Co. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991); *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 559 (6th Cir. 1990).

Civil Service Rule 10 from the City of Detroit Charter of 1997

* * *

SECTION 2. ORDER AND MANNER OF REDUCTION

Reduction in force shall be by class in a department and shall be made from among all employees in the same class in that department.

a. Within the department, the following categories of employees shall be removed first::

   1. Provisional employees shall be separated by terminating their services; provided, however, that employees provisionally employed in the class who hold permanent status in some other class shall revert to the class in the department from which they were provisionally promoted or transferred.

   2. Employees who have not completed their initial probationary period shall be laid off in accordance with their seniority, the least senior employee being laid off first.

   3. Employees hired on a limited-term basis shall be laid off in accordance with their seniority, the least senior employee being laid off first.

b. In the event it is necessary to reduce the number of permanent status employees in the class, the order of removal shall be as follows:

   1. Employees in the class on a limited-term basis and employees in the class on a

permanent basis who have not completed the required probationary period, but who hold permanent status in some other class, shall revert to the class in the department from which they were promoted or transferred. Removal shall be in accordance with their total City seniority, the least senior employee to be removed first.

2. Employees in the class on a permanent basis shall be removed in accordance with their total City seniority, the least senior employee to be removed first. Such employees shall be laid off subject to the following demotion or transfer rights within the department.

   a. *Demotion in Series*

      If the employee is in a class in an occupational series, the employee shall have the right to be demoted to a position in a lower class in the series, provided there are one or more employees in the lower class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

      An employee who waives his right to demotion to the next lower class in series and is laid off, shall lose all rights to city-wide displacement as provided for in Section 3 and restoration rights as

provided for in Paragraph a. of Section 4.

b. *Demotion or Transfer to a Formerly-Held Class*

If the employee has previously held permanent status in another class not in series which is at the same or lower level, the employee may elect demotion or transfer to such class, provided there are one or more employees in the class in the department having less total city seniority. (The least senior employee displaced as a result shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

An election to accept a demotion or transfer to a formerly held class is optional for employees who also have a right to a demotion in series.

c. *Change of Status to Vacant Positions in Other Classes*

If the employee has exhausted his/her rights to demotion or transfer under (a) and (b) above, the department may, in so far as the interests of the service permit, propose transfer or demotion of the employee to an available vacant position in any other class in the department for which the department believes the employee is qualified. Such proposed change of status shall be subject to the

approval of the Human Resources Director.

SECTION 3. CITY-WIDE DISPLACEMENT

Employees with permanent status who have been laid off in a class from a city department shall displace employees of the same classification in those categories listed in Paragraph a. of Section 2 on a Citywide basis. In addition, laid off permanent employees who have one or more years of classified service shall displace other permanent employees in the same classification of lesser seniority on a City-wide basis; and if there are no lesser seniority employees in the same classification, shall have the right to displace lesser seniority employees in a lower class in the same occupational series. Employees who fail to exhaust their eligibility for demotion to the next lower class in series in their department shall lose their eligibility for Citywide displacement. (Least senior employees displaced under this section shall be subject to demotion, transfer or layoff in accordance with applicable provisions of this Rule.)

* * *